E. L. CORD

IBLA 70-80 Decided July 7, 1971

Soldiers' Additional Homesteads: Generally--Homesteads (Ordinary): Second Entry--Words and Phrases: "Entered"

> The grant under the soldiers' additional homestead provision of 43 U.S.C. § 274 (1964) to soldiers who, under the homestead laws, "entered" a quantity of land less than 160 acres does not operate to create any rights under that section where the soldier, under the basic homestead laws, had made a homestead entry for 160 acres, even though such entry was subsequently canceled, and also made a later entry for 40 acres at a time when no law authorized the making of a "second" homestead entry.

Soldiers' Additional Homesteads: Generally

> The Department will not return papers filed in support of a claim of a soldiers' additional homestead right where the claim is found to be invalid and the release of such documents might result in injury to innocent persons.

3 IBLA 11

IBLA 70-80	:	Eastern States 4173
E. L. CORD	:	Soldiers' additional homestead cash election application rejected
	:	Affirmed

DECISION

E. L. Cord has appealed to the Secretary of the Interior from a decision dated August 13, 1969, in which the Associate Director, Bureau of Land Management, denied certification to the Secretary of the Treasury of the appellant's claim for cash payment based upon the soldiers' additional homestead right of John Franklin.

On May 20, 1968, appellant filed application Eastern States 4173, pursuant to P.L. 88-545, 78 Stat. 751 (1964), 1/ electing to receive cash payment for 40 acres of land to which he purportedly is entitled as a remote assignee of a portion of the soldiers' additional homestead right of John Franklin under the provisions of sections 2 and 3 of the Act of June 8, 1872, ch. 338, 17 Stat. 333, as amended, 43 U.S.C. §§ 274, 278 (1964). 2/

1/ This law was designed to bring about the termination of all scrip obligations of the United States, including soldiers' additional homestead rights. Section 5 of that law provided for elections by holders of scrip rights to receive cash payment in lieu of lands.

2/ These sections were once codified as Rev. Stat. §§ 2306, 2307 (1875). Since many of the matters quoted in this decision cite the Revised Statutes, section 2 of the act hereinafter will be referred to as "Rev. Stat. § 2306".

The asserted right was recorded August 5, 1957, in accordance with the Act of August 5, 1955, ch. 573, 69 Stat. 534. 3/

The Bureau's decision adequately stated the other pertinent facts of this case as follows:

> Evidence submitted with the application purports to show that on May 13, 1869, at Springfield, Missouri, John Franklin made original homestead entry No. 2414 for 40 acres and therefore was entitled to 120 additional acres under provisions of section 2306, Revised Statutes, and that the right submitted with this application is now held by the applicant through mesne assignments from John Franklin.
>
> Section 2306, Revised Statutes (43 U.S.C. 274), provides that:
>
> Every person entitled, under the provisions of section 2304, [4/] to enter a homestead who may have heretofore entered, under the homestead laws, a quantity of land less than 160 acres, shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed 160 acres.

The records of this Bureau confirm that John Franklin made the Springfield entry No. 2414 in 1869. The records also show that previously, on February 19, 1866, John Franklin made homestead entry No. 2689 at Boonville, Missouri for 160 acres in T. 34 N., R. 18 W., which entry was cancelled

---

3/ This Act in the main required recordation of all outstanding scrip with the Department within two years after enactment, and recordation of transfers of scrip within the two-year period mentioned above or within six months after transfer, whichever is the longer. Failure to record in accordance with the statute barred the recognition of the scrip for recordation or for the acquisition of lands.

4/ Rev. Stat. § 2304 (1875), 43 U.S.C. 271 (1964), derived from section 1 of the Act of June 8, 1872, ch. 338, 17 Stat. 333.

> January 15, 1875, for failure to make final proof within the statutory period. A comparison of the signatures of John Franklin in the Boonville entry No. 2689 with the signatures of John Franklin in the Springfield entry No. 2414 indicates the same man made both entries. The handwritings in the two entries are strikingly similar; the lands in both entries are located within the same township; and in each entry the entryman gave his address as "of Dallas County, Missouri." [5/]

On these facts the Bureau rejected appellant's application on the following grounds:

> As John Franklin's original homestead entry in 1866 was for 160 acres, he was not entitled to any additional homestead rights under section 2306, Revised Statutes. His subsequent entry No. 2414 therefore could not constitute a legal basis for such rights.

In his statement of reasons for this appeal the appellant does not dispute the facts as found by the Bureau, but acknowledges that: "There is no material dispute as to the facts under which the claim of Appellant is predicated." The appellant, however, sets forth certain explanations as to why the 1866 entry did not go to patent:

> [1] It is obvious that John Franklin abandoned his entry No. 2689 made on February 19, 1866, when he filed his other application on May 13, 1869, entry No. 2414.
>
> [2] Since John Franklin did not perfect his earlier entry and had no intentions of doing so, his entry was cancelled on January 15, 1877 [sic].

Even if these additional alleged facts are true, they provide no reason for changing the decision below.

5/ This accords with the General Land Office letter of April 14, 1925, in Pueblo 035412 (dealing with the asserted soldiers' additional homestead right of John Franklin), both as to language and substance.

At the time Franklin made the 1869 entry, there was no law authorizing the making of a second homestead entry, 6/ it being prior to the enactment of section 2 of the Act of March 2, 1889, ch. 381, 25 Stat.854. 7/ Frank Weller, 41 L.D. 506 (1912); Frank L. Morgan, 37 L.D. 4 (1908); Price Fruit, 36 L.D. 486 (1908). The Department did have discretionary power to permit second entries on equitable grounds in meritorious cases 8/ where the first attempt to exercise the homestead right failed to consummation because of accident, mistake, wrong of others than the entryman, or other sufficient cause, and where the failure was not due to the negligence, fault, or lack of good faith of the entryman. Price Fruit, supra; James J. Kubal, supra note 6; Silas Halsey, 2 L.D. 171 (1883). Such equitable grounds do not appear in the instant case nor have any been asserted. The 1869 entry was therefore without authority of law. See Davis v. McNeel, 2 L.D. 141 (1884).

6/ The pertinent law at that time was stated in the case of James J. Kubal, 25 L.D., 132, 134 (1897), as follows:

"The law bearing upon this question is found in section 2289 R.S., which provides that, 'every person . . . . shall be entitled to enter one quarter-section or a less quantity of unappropriated public lands;' and section 2298, which says: `No person shall be permitted to acquire title to more than one quarter section under the provisions of this chapter.'

"In order to prevent persons from making entry of land, holding it for speculative purposes, selling their rights, and making another entry, the regulations of the land department have provided not only that a person shall not 'acquire title' to more than one quarter section, but that he shall not make more than one entry--even though under his first entry he may not `acquire title.'" See also Lean v. Kendig, 36 L.D. 221, 224 (1907).

7/ The act in part provided:

"Sec. 2. That any person who has not heretofore perfected title to a tract of land of which he has made entry under the homestead law, may make a homestead entry of not exceeding one-quarter section of public land subject to such entry, such previous filing or entry to the contrary notwithstanding; but this right shall not apply to persons who perfect title to lands under the pre-emption or homestead laws already initiated . . . ."

8/ The allowance of second entries under the discretionary power was very rare. Benedict Levin, 1 L.D. 54, 55 (1882).

Franklin's 1866 entry for 160 acres (or his two entries for a total of 200 acres) 9/ disqualified Franklin from obtaining the soldiers' additional homestead right granted by Rev. Stat. § 2306 even though the 160-acre entry did not go to patent, for, as was stated in Frank Weller, supra at 508:

> [I]t is the making of an entry, free from error on the part of the land officials, not the earning of patent thereunder, which exhausts the right [described in Rev. Stat. § 2306]. [10/]

See Edward H. Alcott, 42 L.D. 607 (1913); Frank L. Morgan, supra; Price Fruit, supra; Edgar A. Coffin, 31 L.D. 430 (1902); Royal B. Shute, 31 L.D. 26 (1901).

Thus, the reasons asserted as to why the 1866 entry did not go to patent, even if true, did not prevent that entry from disqualifying Franklin from obtaining any rights under Rev. Stat. 2306. Since Franklin did not obtain any rights under Rev. Stat. § 2306, his assignee, the appellant, has none. 11/

The appellant, in his statement of reasons for this appeal, sets forth a number of legal arguments attacking the grounds given

---

9/ See Frank Weller, supra at 508.

10/ It should also be noted that the Act of September 5, 1914, 43 U.S.C. § 182 (1964), permits "second" (or later) entries where the former entries were made in good faith and were lost, forfeited, or abandoned because of matters beyond the control of the entryman and where he has not speculated in his right or committed fraud or attempted fraud in connection with his entries. Under that law, a person who files an allowable application for homestead entry in Alaska (where no classification by the Secretary is required therefor), and whose application is allowed, is deemed to have "entered" the land. Raymond L. Gunderson, 71 I.D. 477, 483 (1964). Cf. Joseph Q. Clark, A-30215 (December 22, 1964).

11/ Thus, it is not necessary to determine if the appellant has satisfactorily established that he is in fact the present owner of any rights Franklin might have had under Rev. Stat. § 2306. A person seeking to establish a claim under the public land laws has the burden of establishing his right thereto. Van Ragsdale, A-21175 (July 13, 1938).

by the Bureau for rejecting the appellant's application. Essentially, his position is that since the soldiers' additional homestead law was not in effect when the two entries were made, that law cannot be applied to cut off Franklin's (and his) rights in the case at bar.

What the appellant overlooks is that the soldiers' additional homestead law does not cut off any rights. E.g., Earl C. Pound, 43 L.D. 205, 206-07 (1914). That law grants rights, but only to those veterans who entered less than 160 acres. E.g., Montague v. McCarroll, 36 P. 50 (Utah 1894). Appellant's arguments have been carefully examined, and we find that the principles of law applicable to this case, which have already been set forth in this decision, clearly show that the arguments are without merit. Furthermore, the cases cited by the appellant in support of these arguments are not disconsonant with such applicable principles of law.

Finally, one other matter, although not referred to by the appellant on this appeal, should be mentioned. The Bureau's decision stated that:

> The assignment of the alleged right in blank, by Jeremiah Collins, alleged assignee of John Franklin, on November 2, 1920, and submitted by the applicant with his name filled in as assignee, will be retained by the Government. It has been the uniform rule of the Department to retain in its possession invalid papers that might be mistakenly assumed to confer rights against the Government. Such an instrument purporting to convey rights, which in fact does not, can be used for no legitimate purpose. The Government therefore has the right, and duty, to protect itself against any wrongful claim by reason thereof. ([Frank Weller,] 41 L.D. 506 (1912); [Merritt A. Green (On Rehearing),] 47 L.D. 86 (1919).)

We agree that the two cases cited by the Bureau show that the Government has the authority to retain the papers in question. We also agree that the Government should retain the papers, both for the reasons given by the Bureau and also for the reasons stated in Frank Weller, supra at 507, as follows:

> [T]he purported assignment has no value, and could serve no purpose except to be made an instrument of fraud, and therefore the Government, knowing

> the claim to be spurious, will not release it to again become the subject of barter and sale, with the probability of innocent persons being deceived thereby, and resulting in further useless harassment to the Government. [12/]

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 211 DM 13.5; 35 F. R. 12081, 13/ the decision of the Bureau of Land Management is, for the reasons stated herein, affirmed.

_____
Frederick Fishman, Member

We concur:

_____
Francis E. Mayhue, Member

_____
Martin Ritvo, Member

_____

12/ The holding of Frank Weller on this matter was followed in Clark I. Wyman, Assignee, 55 I.D. 107 (1934).

13/ The delegation was amended on April 6, 1971. See Release No. 1282. The amendment, however, is not pertinent to this case.